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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 863

WHITMAN PUBLISHING COMPANY, A CORPORATION,
Petitioners,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

STANLEY SUYDAM,
Counsel for Petitioner.

RUSSELL HARDY,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

The Whitman Publishing Company prays that a Writ of Certiorari issue to review the judgment of the Court of Claims in the above-entitled case rendered October 7, 1946, and as reported in 65 F. Supp. 487. (R. 19)

I. Statement of the Matter Involved

Petitioner brought suit in the Court of Claims to recover $19,606.21, excise tax paid to the defendant upon the manufacture and sale of certain games made and sold by petitioner.

The tax was paid under a statute imposing a tax as follows:

> There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax

> equivalent to 10 per centum of the price for which so sold; . . . games and parts of games (except . . . children's toys and games) . . .

The substance of the findings of evidentiary facts in the Court of Claims is as follows:

> (1) That petitioner's business consisted largely of the manufacture of games and books designed especially for children and persons eighteen years of age and younger.
>
> (2) That the games involved in this case were made of cheap material, low price being a factor taken into consideration in planning them.
>
> (3) That plaintiff's games were sold almost entirely through the 5 and 10 Cent Stores throughout the country.
>
> (4) That petitioner's games, sold through Woolworth's and McCrory's were displayed for sale upon their counters "in a section devoted to children's toys, such as rubber balloons, jacks, kites, juvenile books and kindred items."
>
> (5) That the Woolworth Company classified such games as petitioner's, as "part of toys."
>
> (6) That the McCrory Company displays in its toy department, along with petitioner's games, upon the same counters therewith, items such as "toy footballs," "cardboard alphabet blocks," "tea time plastic dishes," "checkers and chess," "Busby games," "teething rings," "toy money," and other similar items such as "kiddies' story books," a book called "Kittens and Puppies," "Blondie," "Nursery Rhymes," "Mother Goose," "Tiny Tots," and painting sets and paint books.

The other findings of facts indicate the great simplicity of the games from the standpoint of playing function, that the materials were of the most inexpensive and fragile charac-

ter, that they were of low price, ranging from six cents wholesale to twenty-five cents retail, that only a slight degree of intelligence is required to play the games, and that in many instances the boxes in color, format, name, shape and size were designed to appeal to and suit only children.

On May 6, 1946, the Court of Claims on these findings concluded that eight of the games were not children's games, and hence that they were subject to the tax (R. 5). On October 7, 1946, the Court overruled petitioner's motion for a new trial. (R. 19)

II. Jurisdiction

Revenue Act of 1932, c. 209, 47 Stat. 169:

> There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold: Tennis rackets, tennis racket frames and strings, nets, racket covers and presses, skates, snowshoes, skis, toboggans, canoe paddles, polo mallets, baseball bats, gloves, masks, protectors, shoes, and uniforms, football helmets, harness and uniforms, basket ball goals and uniforms, golf bags and clubs, lacrosse sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, chess and checker boards and pieces, dice, games and parts of games "except playing cards and children's toys and games;" and all similar articles commonly or commercially known as sporting goods.

Title 28, Sec. 288, U. S. C., as amended by Chap. 140 of the Act of May 22, 1939, 53 Stat. 752:

> (b) In any case in the Court of Claims, including those begun under section 287 of this title, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause be certified to it for

review and determination of all errors assigned, with the same power and authority, and with like effect, as if the cause had been brought there by appeal. In such event, the Court of Claims shall include in the papers certified by it the findings of fact, the conclusions of law, and the judgment or decree, as well as such other parts of the record as are material to the errors assigned, to be settled by the Court.

The Court of Claims shall promulgate rules to govern the preparation of such record in accordance with the provisions of this section.

In such cases the Supreme Court shall have authority to review, in addition to other questions of law, errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue. As amended May 22, 1939, c. 140, 53 Stat. 752.

III. Question Presented

The question presented for determination is whether or not, as a matter of law, the Court of Claims erred in making conclusions of fact which were determinative of the issue, such conclusions of fact being based upon the Court's special Findings of Fact in no wise supporting the Conclusions of fact in certain instances.

IV. Reasons for Granting the Writ

The petitioner brought suit in the Court of Claims to recover certain excise taxes paid upon the manufacture and sale of certain games. The names of these games, together with the amount of tax paid upon the manufacture and sale thereof and the holding of the Court in respect of each, will be found set forth in Appendix "A." The sole question which was presented to the Court of Claims was whether or not any of these games were children's games

within the purview of Section 609 of the Revenue Act of 1932 and thus not subject to tax. The Court held, as a matter of law, that eight of the games listed in Appendix "A" were subject to the tax.

Under Section 28 (b) of Title 28 of the U. S. Code, this Court has authority to review errors assigned, to the effect that an ultimate finding of fact is not supported by the findings of the evidentiary or primary fact.

Moreover, in case, under the rules of this Court, this Court will review the decision of a lower court, where such court has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

Conclusion

For the reasons stated herein and in the Brief which accompanies this Petition, it is prayed that a Writ of Certiorari issue to the Court of Claims to review the final judgment of that Court rendered on October 7, 1946.

Respectfully submitted,

STANLEY SUYDAM.

RUSSELL HARDY,
Of Counsel.

APPENDIX "A"

Catalogue number	Name	Tax paid	Holding of Court
2008	Lotto	$2,000.61	Taxable
2173	Bingo	1,831.51	Taxable
2183	Grand National	1,050.06	Taxable
2931	McCarthy Bingo	350.38	Not taxable
3003	Lotto	3,331.51	Not taxable
3004	Anagrams	1,863.04	Not taxable
3010	Authors	2,193.90	Taxable
3022	Game Implements	441.68	Taxable
3030	Authors	921.76	Taxable
3033	Bingo	3,730.81	Taxable
3053	Football	1,260.91	Not taxable
3924	Game of Words	434.20	Not taxable
5016	National Derby	195.84	Taxable

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 863

WHITMAN PUBLISHING COMPANY, A CORPORATION,
Petitioner,

vs.

THE UNITED STATES

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

I. Jurisdiction

This Court has jurisdiction to entertain and grant this Writ under Title 28, Section 288, of the United States Code, which provides, *inter alia*, as follows:

> "In such cases the Supreme Court shall have authority to review, in addition to other questions of law, errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue."

II. Statement of the Case

Petitioner brought suit in the Court of Claims to recover $19,606.21, excise tax paid to the defendant upon the manufacture and sale of certain games made and sold by petitioner.

The tax was paid under a statute imposing a tax as follows:

> There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to ten per centum of the price for which so sold: . . . games and parts of games (except . . . children's toys and games) . . . (Revenue Act of 1932, C. 209, sec. 609; 47 Stat. 169)

The substance of the findings of evidentiary facts in the Court of Claims is as follows:

> (1) That petitioner's business consisted largely of the manufacture of games and books designed especially for children and persons eighteen years of age and younger.
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> (2) That the games involved in this case were made of cheap material, low price being a factor taken into consideration in planning them.
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> (3) That plaintiff's games were sold almost entirely through the 5 and 10 Cents Stores throughout the country.
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> (5) That the Woolworth Company classified such games as petitioner's, as "part of tyos".
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> (6) That the McCrory Company displays in its toy department, along with petitioner's games, upon the

same counters therewith, items such as "toy footballs," "cardboard alphabet blocks", "tea time plastic dishes", "checkers and chess", "Busby Game", "teething rings", "toy money", and other similar items such as "kiddies story books", a book called "Kittens and Puppies", "Blondie", "Nursery Rhymes", "Mother Goose", "Tiny Tots", and painting sets and paint books.

The other findings of fact indicate the great simplicity of the games from the standpoint of playing function, that the materials were of the most inexpensive and fragile character, that the games were of low price, ranging from six cents wholesale to twenty-five cents retail, that only a slight degree of intelligence is required to play the games, and that in many instances the boxes in color, format, name, shape and size were designed to appeal to and suit only children.

III. Error

The Court of Claims, after finding all of the evidentiary facts which supported the contention of the plaintiff and which required, as a matter of law, the Court to conclude, as a matter of fact, that all of the game implements in controversy were children's game implements, nevertheless, and in direct contradiction to the evidentiary facts, as found, the Court held eight of the thirteen game implements to be adult game implements and thus subject to the tax.

IV. Argument

The tax involved in this case is an excise tax upon the manufacture and sale of the game implements which will be found listed in Appendix A of the accompanying Petition.

After the Court had found all of the evidentiary facts which impel the conclusion that all of the game implements

in controversy were children's game implements, the Court, in direct contradiction thereto, concluded, in eight instances, that the game implements were not children's game implements, and thus subject to the tax. The error of law which the Court committed in this case undoubtedly arose from the failure to apprehend the distinction between the materials and implements with which the games are played, and the act and function of playing the games. The tax involved is not a tax upon the act of "playing" a "game", but is a tax upon manufacture and sale of the devices or implements with which the "games" are played. In other words, the tax is not a tax upon a *function*, but is a tax upon tangible game implements which were the subject of manufacture and sale by the petitioner.

The Court's opinion clearly reveals the extent to which the Court failed to understand the difference between a "game implement" and the business of playing a game with game implements. This distinction is basic and is the crux of this case. Nowhere within the four corners of the Court's findings of the evidentiary facts can support be found for the conclusions of fact that items Nos. 1, 2, 3, 7, 8, 9, 10, and 13, appearing on the list set forth in Appendix A, are adult game implements.

In the case of *United States* v. *Esnault-Pelterie*, 299 U. S. 201, 205-207, 81 L. Ed. 123, 126, 127, this Court laid down the rule that the Court of Claims must make findings of the evidentiary facts and reach a conclusion based upon and consistent with those findings. The Court said:

> Similarly a judgment upon a special verdict cannot be sustained unless the findings extend to all material issues. The same principle governs in cases brought here from the Court of Claims, . . . The findings are required to be in the nature of a special verdict and specifically to set forth the ultimate facts;

> the evidence is not brought up. As by its general traverse defendant put in issue all of the complaint, the findings in order to be sufficient to sustain judgment for plaintiff must specifically decide questions of validity and infringement, and also include circumstantial facts sufficient to warrant the Court's conclusion in respect of the main issue. The special findings may not be aided by statements in the conclusions of law or the opinion of the court to the effect that the patent is valid and infringed.

When the *Esnault-Pelterie* case again reached this Court (303 U. S. 24, 82 L. Ed. 625), the Court repeated the rule as follows:

> We may, of course, inquire whether the subordinate or circumstantial findings made by the court below necessarily override its ultimate findings of fact and show that the judgment in point of law, is not sustainable. (p. 31)

The findings and conclusions of the Court of Claims in this case are violative of the rule thus laid down, because its findings of the subordinate facts override its ultimate finding; in other words, the findings of evidentiary facts are in direct conflict with the conclusions therefrom.

This Court will note that the substance of the findings of evidentiary facts in the court below is as stated under the Statement of the Case.

Those six points constitute almost all of the Court's findings of the evidentiary facts. The only additional findings of the evidentiary facts, indicate the utter simplicity of all of the games herein involved, the cheap, fragile character of the materials with which they were constructed, their very low wholesale and retail prices, ranging from six cents wholesale to twenty-five cents retail, the slight

degree of intelligence required to "play" the games, ranging from the average intelligence of eight years of age to fourteen years of age, and that, in many instances, the boxes containing the game implements and the game implements themselves were designed in color appeal, general format, name, shape, and size to appeal to and suit only children.

Despite these findings of the evidentiary facts and in direct contradiction thereto, the Court held one set of plaintiff's game implements called "Lotto," which is identical with another set of plaintiff's game implements also called "Lotto," to be a child's game and the other to be an adult game, the Court indicating no standard of differentiation. Again, despite the fact that the Court found, as an evidentiary fact, that "Lotto" is exactly like "Bingo," the Court held both sets of plaintiff's game implements called "Bingo" to be adult game implements.

(1) Unless the decision of the Court of Claims shall be reviewed and reversed by this Court, that Court's erroneous decision if subsequently followed will make it literally impossible for any claimant in the Court of Claims to establish, as a matter of evidence, or as a matter of fact, the nature, for tax purposes, of any article of manufacture and sale. In this case, literally all of the evidence supported the exactly opposite conclusion to that reached by the Court in the eight instances noted.

(2) Unless the decision of the Court of Claims shall be reviewed and reversed by this Court, that Court will undoubtedly continue to disregard the fundamental rule laid down by this Court in the *Esnault-Pelterie* case, *supra,* that conclusions of fact must find support and follow as a necessary inference from the findings of the evidentiary facts.

Conclusion

It is respectfully submitted that the petition for writ of certiorari to the Court of Claims should be granted in order that the errors complained of may be corrected.

Respectfully submitted,

STANLEY SUYDAM.

RUSSELL HARDY,
Of Counsel.

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